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Speak softly and carry a big stick: hardening soft governance in EU energy and health policies

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Abstract

EU governance is experiencing a shift towards soft governance frameworks that incorporate ‘harder’ elements. Using a qualitative case study approach and an original set of elite interviews, we examine two policy areas – health and energy – where similar such architectures – the European Semester and the Energy Union Governance Regulation – are now core governance tools. Three research questions are addressed: (1) What mechanisms are employed to harden these governance frameworks? (2) What is driving this shift? And, drawing on the more extensive experience of the Semester, (3) What lessons can be drawn for energy policy? We establish the experimentalist nature of these two governance architectures and identify a mix of ‘harder soft governance’ (HSG) mechanisms used in both cases. We show that, although similar in structure, the shift towards HSG frameworks is driven by different factors in each case. The more extensive experience of the Semester in health points to the importance of concrete implementation practices; the power of specificity to strengthen soft commitments; the role of policy coupling as a lever for implementation; the potential influence of strategic entrepreneurs; the role of politicisation in pressuring change; and the significance of periodic revision as windows of opportunity for incremental change.

Key Words

Energy Policy; European Union; Experimentalist Governance; Harder Soft Governance; Health Policy; European Semester

Introduction

Soft governance frameworks such as the Open Method Coordination (OMC) were introduced in the 1990s to address the legitimacy challenges faced by the traditional Community Method and to circumvent gaps in European Union (EU) competence, which made authority-based governance legally and politically unacceptable (Eberlein & Kerwer, 2004). Although they enjoyed some success, their reliance on the willingness of national governments to initiate policy change has limited compliance (Mosher & Trubek, 2003). In order to address this common weakness, a strengthening of soft governance is being seen across several EU policy areas (Graziano & Halpern, 2016; Ringel & Knodt, 2018), notably through the ‘layering’ of more hierarchical mechanisms onto existing soft governance frameworks (de la Porte & Heins, 2016). This has been conceptualised as a distinct ‘harder soft’ mode of governance (HSG) whereby policy instruments with a soft basis – such as voluntary commitments, peer review or policy monitoring – are supplemented with a harder element – for instance, by making the outcomes of peer review public to name and shame laggards, or by applying sanctions where monitoring reveals shortcomings (see Knodt & Schoenefeld, 2020).

A prime example of this trend is the European Semester. Mirroring many features of the OMC (see De la Porte & Stiller, 2020), the Semester is an annual cycle of macro-economic analysis, reporting, recommendations and evaluation, hardened by the potential for sanctions where member states fail to implement recommendations (Bekker, 2020). After almost a decade of operation, the Semester has become core to the EU’s economic governance, influencing a wide range of sectors, such as health, where EU competencies had remained limited. It now serves as a blueprint for other, specific policy sectors. For instance, the new Regulation on the Governance of the Energy Union and Climate Action (hereafter *Governance Regulation*), adopted in 2018, is partly modelled on the Semester.

This article is based on the observation that sensitive and comparatively ‘new’ fields of European integration, such as health and energy, have seen the introduction of governance architectures which combine hard and soft law elements in new ways. It addresses three research questions: (1) what harder mechanisms are embedded in the Semester as applied to health and in the new energy governance framework?; (2) what is driving this shift towards ‘hardening’ these soft governance frameworks; and, given the longer experience of health policy within the Semester, (3) what lessons can be drawn for the future development of energy policy?

The article first outlines the analytical framework, which combines Experimentalist Governance - a primarily soft model of governance - with the HSG framework to map and explain the hardening of governance architectures. The main empirical sections identify the experimentalist and harder elements of the Semester as applied to health and Energy Governance, before exploring their drivers. Finally, we use the experience of health in the Semester to identify six tentative lessons for energy under the Governance Regulation, namely: the importance of concrete implementation practices; the power of specificity to strengthen soft commitments; the role of policy coupling as a lever for implementation; the potential influence of strategic entrepreneurs; the role of politicisation in pressuring for change; and the significance of periodic revision as windows of opportunity for incremental change.

1. Analysing HSG

Soft governance is an ideal-typical mode of governance characterised by a voluntary, non-hierarchical decision-making process based on coordination, communication and learning; it produces rules that are not legally binding (Trubek & Trubek 2005). It can be contrasted with the top-down, centralised, and rule-based model of hard governance, which produces treaties and laws enforceable by Courts.

We draw on Sabel and Zeitlin's (2010) well-established soft governance model - the Experimentalist Governance framework - to map key features and logics of the Semester in health policy and assess similarities and differences with the Governance Regulation. We complement this with the HSG framework (Ringel & Knodt 2018; Knodt & Schoenefeld 2020) to identify their embedded harder elements.

1.1. Mapping Experimentalist Governance architectures

Sabel and Zeitlin (2010, p. 13) identify four elements characteristic of an experimentalist model of governance, linked in an ongoing, iterative cycle. First, broad '**framework goals**' are agreed jointly at the higher governance level, and metrics adopted so that progress can be measured. Second, responsibility for pursuing these goals rests with the '**lower level units**' and these units are given considerable discretion. Third, the condition of this discretion is regular **reporting**, peer review of performance and public justification of decisions; this facilitates scrutiny, contestation and participation by a wider range of actors (Sabel & Zeitlin, 2008). Finally, the goals, metrics and procedures of decision-making themselves are periodically subject to **revisions** in response to learning in the earlier stages, and the cycle repeats.

This model is predominantly soft, based on cooperation and learning. As for the hardened elements that may induce cooperation, Experimentalist Governance points to the concept of 'penalty defaults' (Sabel & Zeitlin, 2010, p. 14) as a driver for member states to engage in soft governance. Keohane and Victor define penalty defaults as:

'a form of enforcement that does not prescribe solutions – which may be impossible to agree on because states likely to be targeted will block them – but that forces the actors to cooperate unless they are willing to risk losing control of their joint fate' (2015, p. 207).

Penalty defaults involve an alternative to cooperation that is ‘so manifestly unworkable to the parties as to count as a draconian penalty’ (Sabel & Zeitlin, 2008, p. 308) and therefore does not require the potential intervention of a superior authority to induce cooperation. Examples include market exclusion, threat of regulatory intervention or trade sanctions. Penalty defaults can be distinguished from the ‘shadow of hierarchy’ (e.g. Héritier & Lehmkuhl, 2008), which refers to the authorities’ ability to *actively and purposefully* impose an unwanted outcome on cooperating parties in case of lack of agreement, inducing them into reaching a compromise.

Beyond this, there is little within Experimentalist Governance to account for the harder elements increasingly embedded in soft governance frameworks. We therefore complement with the HSG framework.

1.2. Hardening soft governance

Knodt and Schoenefeld (2020) identify more precisely a series of mechanisms which have been introduced to harden soft governance (or to soften hard governance) and are characteristic of the emerging but distinct hybrid HSG model. These are both formal and informal, and apply at different stages of the policy-making process (goal setting, monitoring and enforcement). They include the introduction of ‘hard’ targets or implementation mechanisms which reshape voluntarism (A); naming, blaming and shaming via publication of public databases, rankings, reports and other information (B); institutionalising political entrepreneurs and strengthening their political role (C); requiring justification of (in)action by member states (D); coupling policy fields to create linked financial incentives or sanctions (E); introducing sanctions or penalties for non-compliance (F); and including a mandate for Commission tertiary legislation such as implemented or delegated acts (G). The authors acknowledge that this is not an exhaustive list and encourage empirical studies to identify additional mechanisms. This article responds to that call and adds three further mechanisms (see Table 1): recommendations that

are highly tangible and specific (H); a high threshold, such as consensus or a super-majority, for making amendments to recommendations or change policy instruments (I); more intensive policy surveillance is initiated when certain conditions are met (J).

1.3. Drivers of the hardening of soft governance

In seeking to analyse the interests and political dynamics that are driving the shift towards HSG, Experimentalist Governance and the wider literature on New Modes of Governance (NMGs) to which it belongs, offer some hypotheses.

Experimentalist Governance explains the development of iterative bottom-up governance processes as functionally necessary in a context of strategic uncertainty and polyarchic distribution of power. Sabel and Zeitlin (2008) argue that Experimentalist Governance is better suited to respond to a deeply uncertain and changing context than a strictly hierarchical one. Goals and instruments can be periodically adjusted in a more agile fashion based on learning or in response to emerging issues. A polyarchic distribution of power between a wide range of actors - public and private and operating at different governance levels - makes it also necessary, they argue, to have a more horizontal, open and transparent process, that can tap into all actors' expertise and bring them on board.

A second line of argument, recurring in the literature on NMGs, stresses the ability of soft governance frameworks to address the issue of non-compliance with hard law by reinforcing joint ownership of commonly agreed decisions (Saurugger & Terpan, 2016, p. 57). Some authors highlight learning processes and creation of common norms as important to successful implementation and compliance (Radaelli, 2008). The compliance argument remains highly contested, however. Saurugger and Terpan (2016) find, for instance, that compliance with soft law is no more common than with hard.

A third line of argument points out that a core motivation for adopting soft governance frameworks is to overcome paralysis resulting from vetoes and divisions. A key advantage of soft law is that it is easier to agree than hard law, and this is ‘especially true when the actors are states that are jealous of their autonomy and when the issues at hand challenge state sovereignty’ (Abbott and Snidal, 2000, p. 423). Soft governance enables governments to: overcome disagreement; surmount resistance; limit sovereignty losses and keep control of key decisions; and shift the blame towards the EU (Schaëfer, 2006, pp. 83-84). In the EU context, soft governance - often based on an intergovernmental and decentralised mode - can be seen as a means of policy expansion into ‘new’ areas which had remained excluded from European integration due to sovereignty concerns, making cooperation possible while limiting sovereignty losses (Bickerton et al., 2015). It also enables supranational institutions, and particularly the Commission, to extend their authority and influence.

Decision-makers might adopt soft law in the expectation that it will act as a precursor to hard law, or so as to use the threat of this potential evolution to push parties into compliance - something akin to the ‘shadow of hierarchy’ (Héritier & Lehmkuhl, 2008). When this is not a workable or effective strategy, because of a lack of formal competencies or enduring resistance by key veto players, HSG frameworks may become the preferred, middle ground approach. The hardening of soft governance, then, is a response to the perceived problems of soft governance in the absence of strict legal enforcement and aims to strike a balance between autonomy and effectiveness.

1.4. Methodology

The Semester is a horizontal governance architecture (Borras & Radaelli, 2011), meaning its recommendations target a range of policy areas; by contrast, the Governance Regulation applies only to energy and climate policy. Drawing lessons from the Semester for the

Governance Regulation thus requires us to focus on its operation in a specific policy sector. We use the Semester's impact upon health policy as a case study. The Semester was not designed as a tool of health governance but, since health makes up a significant proportion of national expenditure, health systems became a target of efforts to induce fiscal sustainability. In light of this, and as the Semester has become institutionalised at the core of the EU governance system, health actors have been forced to respond, engage, mitigate and, increasingly, to exploit its processes in pursuit of health objectives (Greer & Brooks, forthcoming). It has thus become a tool of health governance, and one used proactively, in some cases, by actors seeking to shape national health systems.

The use of health within the Semester to draw lessons for the energy Governance Regulation is guided by the considerable similarities in the historical political and legal contexts of these two sectors. In both, responsibility is split and, whilst the EU has accumulated significant influence, national governments remain wary of ceding competences. Integration has relied on the application and extension of internal market rules, as well as interdependency with related policy areas, such as competition, trade, security and climate, reflecting the 'nexus quality' of both sectors (Ringel & Knodt, 2018, p. 210). In both, dedicated legal bases were only established more recently, at Maastricht (for health) and Lisbon (for energy), and only enable use of the ordinary legislative procedure in specific issue areas, which include public health on the one hand, and renewable energy, the internal energy market and energy efficiency on the other. In areas of greater sensitivity – such as the organisation and financing of health systems, and the energy mix respectively – the EU's involvement is restricted.

The article's empirical basis is a primary documentary analysis and data from 21 semi-structured, anonymous elite interviews. Documentary analysis included the core documents of the European Semester and of the Governance Regulation - complemented by press reports -

and served to map the instruments, processes, mechanisms and actors involved in each governance architecture. This was complemented by interviews conducted between 2015 and 2018 with key actors, including those representing EU institutions and member states (see appendix 1).

2. The hardening of health governance via the European Semester

2.1 The Semester as a tool of experimental health governance

The European Semester is the EU's fiscal planning process, synchronising the surveillance, reporting and enforcement elements of both the Stability and Growth Pact (SGP) – which sets targets for national debt and deficits – and the Europe 2020 Strategy – which promotes jobs and growth in the Union. It responds to perceived weaknesses of the Economic and Monetary Union and the SGP, following the economic crisis, by establishing an ongoing process of surveillance of national budgets. The cycle starts with the Annual Growth Survey (AGS), in which the Commission assesses priorities for the EU. National governments communicate their plans in response to this, and the EU makes recommendations to each member state. Though formally non-binding, these Country-Specific Recommendations (CSRs) can trigger coercive responses for those countries subject to the Excessive Deficit Procedure (EDP) or the Macroeconomic Imbalance Procedure (MIP), since these are based on the Six Pack and the Two Pack legislation. In each of these instances, sanctions are decided by reverse-qualified majority voting, meaning that they are imposed automatically save for a blocking vote by a qualified majority. As such, whilst it draws heavily on the instruments and processes of the OMC, what distinguishes the Semester is the potential for its 'soft' recommendations to

become ‘hard’ requirements where member states fail to abide by the rules (Bauer & Becker, 2014).

Health at the EU level has historically been governed by policy frameworks and competences outside of health, such as the internal market, but the Semester constitutes a marked change in two ways. Firstly, it extends EU action into the realm of healthcare financing and organisation – arguably the most sensitive area of national health policy. Secondly, it does so using a combination of soft and hard instruments, making member states’ discretion to ignore recommendations dependent upon their fiscal situation (Stamati & Baeten, 2015; interview 19). Few of these instruments are new to health – not least of all because most are duplicated from the healthcare OMC – but the extent to which they are binding, their linkage with other policies and the scale of the policy surveillance which accompanies them is novel.

The Semester’s **framework goals** are set by the AGS and there were originally three overarching priorities: ‘rigorous fiscal consolidation’, ‘labour market reforms’ and ‘growth-enhancing measures’ (Commission, 2010). For health, the goals in the AGS have varied in their specificity, with early Surveys calling for broad reforms to promote ‘cost-effectiveness and sustainability’ (Commission, 2011, p. 5) and later iterations providing more detailed encouragement to ‘provide quality health care through efficient structures, including eHealth’ (Commission, 2014, p. 13), for instance. The CSRs embody the agreed routes by which member states will pursue the goals, in light of their particular national contexts, and thus serve as metrics by which progress can be measured. For example, CSRs might advise member states to ‘implement...administrative reform with a view to better cost-effectiveness of...healthcare services’ (Council of the EU, 2016, p. 82).

Whilst the Semester implements the hard targets of the SGP – which limit government deficits to 3% of GDP and debts to 60% of GDP and are sanctionable save for a reverse qualified

majority vote – it does not set its own hard framework goals. The exception here is the EDP and the MIP, in which member states that have deviated from the 3% and 60% ceilings are issued with recommendations drawn from the CSRs, and face sanctions if they do not comply (mechanisms A and F). In one instance, this has presented a remarkable situation for health policy. Whilst under the EDP, France was issued a CSR urging it to restructure its health workforce policy by abolishing a long-standing annual limit on the recruitment of medical students (European Council, 2015). France exited the EDP relatively quickly and thus escaped having to comply with the requirement, but was subject to enhanced surveillance (mechanism J). The case illustrates the potential for the hardening of a framework goal to lead to unprecedented EU oversight of health policy (Greer & Jarman, 2018).

The lower-level units responsible for achieving the Semester's framework goals are the member states. Governments are required to submit: 1. Stability or Convergence Programmes, which serve as public **reporting** on adjustment towards the SGP rules; 2. National Reform Programmes (NRPs), detailing progress towards the goals of Europe 2020; and 3. for euro area states, Draft Budgetary Programmes, through which the EU exercises *ex ante* control over fiscal policies (mechanism B). In the NRPs, for instance, governments must specify precisely which policies they will introduce. For example, Belgium's 2014 NRP details the specific instrument introduced to assess patients and various other policies which will contribute to achieving the CSR on increasing the cost-effectiveness of long-term care (Belgian government, 2014, pp. 8-9) (mechanism H).

The framework goals, metrics and processes of the Semester have changed considerably since it was launched in 2010, through periodic **revisions**. The literature has identified a process of 'socialisation' of the Semester (Zeitlin & Vanhercke, 2018), and traces the increasing emphasis on social objectives. More specifically, health actors have engaged in the Semester process and

employed various strategies to undermine its original, narrow focus: the broadening of goals, the expansion of the scope of conflict and the nuancing of indicators (Greer & Brooks, forthcoming). Since its inception, the Semester's framework goals have broadened from cost-containment to universal access to healthcare (as featured in the latest AGS); the community of actors involved has expanded; and the metrics used to monitor progress have been challenged and nuanced to include, for instance, data on unmet medical need and out-of-pocket payment for health services (interview 18).

2.2 The harder edge of the Semester

There are three main sources of hardening within the Semester. Firstly, high thresholds for change have been introduced (mechanism I). Overturning of fines for non-compliance with the deficit procedure requires a reverse qualified majority, and amendment of the CSRs requires a 'reinforced' qualified majority in the Council. This is combined with a 'comply or explain' rule compelling the Council to publicly justify the change sought (Zeitlin & Vanhercke, 2018, p. 161), a requirement that amendments may not 'reduce a member state's effort', and a short timeframe for their agreement; 'as a result, no substantial amendments to health CSRs have yet been approved by the Council' (Baeten & Vanhercke, 2017, pp. 489-90).

A second element of HSG is the institutionalisation of political entrepreneurs – namely, civil society actors (mechanism C).¹ For instance, the Semester has evolved to provide for greater involvement of health ministries, civil society actors and the Commission's health directorate, whilst the latter has significantly increased its expertise in health system performance assessment and aggregation of country-specific health information to ensure its involvement (Brooks, 2015; interviews 14, 18, 19).

¹ On its 'socialisation' see Zeitlin & Vanhercke (2018); on its undermining see Greer & Brooks, (forthcoming).

Finally, instances of policy coupling can be seen. Most importantly, the rules of the 2014-2020 European Structural and Investment Funds (ESIF) - the five funds constituting the EU's main redistributive financial instruments - enable the EU to request a government to direct part of any funding that it receives in pursuit of its CSRs and to suspend payments where insufficient progress is made, (mechanism E; Stamati & Baeten, 2015, p. 185). Conversely, should a government wish to finance health – for instance by investing in the creation of a new national health insurance system – it must submit a strategy for review by the Commission, for potential inclusion in the next round of CSRs (Baeten & Vanhercke, 2017, p. 491). This coupling and conditionality theoretically increases pressure to implement the CSRs. However, it is worth noting two points. The first is that use of ESIF funds has to be justified according to objectives wider than health alone - such as employment, innovation and growth - something that health actors have not historically been good at (Greer et al., 2019, p. 172). The second is that, in practice, the EU generally prefers to adopt a flexible approach. When tested for the first time, by failure to bring excessive deficits under control by the Spanish and Portuguese governments in 2016, the institutions declined to suspend funds or apply sanctions, raising questions about the mandatory and quasi-automatic nature of the conditionalities (Sacher, 2019).

In sum, the HSG elements of the Semester better facilitate broad shaping of the policy context than hard enforcement of specific provisions. The high thresholds for change via the Council meant that few CSRs have been amended this way, and whilst policy coupling has created some leverage for the institutions, resistance to formal sanctions remains. However, by involving themselves at the agenda-setting stage, political entrepreneurs have become key actors in the drafting and contextualisation of the recommendations, and have used the iterative revision of the process to expand, nuance and blur its focus.

2.3 The drivers of HSG in health governance

When assessing the drivers of HSG in health governance a distinction must be made between the interests and political intentions behind the European Semester as a whole, and its integration into EU health governance in particular. The Semester is intended to prevent future economic instability, rather than to introduce HSG into EU health policy specifically. It was driven by a need to address non-compliance with the SGP whilst being mindful of sovereignty concerns (Savage & Howarth, 2018). As a tool of health governance, the drivers of the Semester's expansion are slightly different. Greer and Vanhercke identify clearly the default penalty which encouraged health actors to engage in the OMC on health: 'the penalty for lack of action is progressive submission to internal market law as extended in an unpredictable, case-by-case manner' (2010, p. 222). The EU has no mandate to govern the areas of health organisation and financing which are targeted by the Semester and, as such, member states are unlikely to be concerned about interference via an alternative mechanism. Instead, the penalty is that actors with less knowledge of (and potentially regard for) health, led by the Commission's Economic and Financial Affairs directorate, will be responsible for drafting recommendations which impact upon health (Stamati & Baeten, 2015, p. 189; interview 20). Health ministers were initially induced to engage by the realisation that, otherwise, their counterparts in treasury and finance ministries would continue to make policy which affected health without due concern (interviews 15, 16; Fierlbeck, 2014, p. 93). They were struck by the reality that 'even if they are not at the [Semester] table, they will remain on the menu' (interview 17).

Clearly, then, part of what has driven engagement with the Semester is the reality of its impact upon national health policy, however indirect, and the decision by some actors to make proactive use of its mechanisms. At the extreme end of this characterisation, the Semester is understood to offer "new opportunities to ... defend and mainstream EU social objectives" and is utilised by social policy actors as such (Zeitlin & Vanhercke, 2018, p. 150;). At the very

least, the health-related elements of the Semester are now being driven by health actors who see an opportunity to consolidate and extend the EU's nascent health system agenda (interviews 24, 25; Brooks, 2015).

In this regard, the force now driving HSG within health policy is the Commission and, in particular, its health directorate. Extension of EU influence into health systems organisation and financing might not have been a goal of the Commission prior to the crisis – though Baeten and Thomson (2012) trace the origins of EU interest in this field back to the mid-1990s – and soft law in this area is unlikely to lead to subsequent legislation, given that the treaties explicitly preclude EU involvement. However, states now receive CSRs on areas core to health system organisation (Azzopardi-Muscat et al., 2015, p. 380), marking a significant step forward in health integration, and creative opportunists within the Commission have moved beyond reactive management of this new influence into proactive utilisation and shaping of it (Greer & Brooks, forthcoming). Moreover, they have been supported by a network of civil society actors, vocal in contesting the ownership of finance actors over the process and demanding a role for themselves and the European Parliament (Stamati & Baeten, 2015, p. 189).

3. The Governance Regulation: softening or hardening energy governance?

3.1. The Governance Regulation as experimentalist energy governance

EU energy policies have mainly developed as hard law, in the form of a growing body of directives and regulations (Kanellakis et al. 2013). Energy was included in early cycles of the Semester but remained peripheral, being less relevant to the Semester's original fiscal objectives, and did not feature prominently in the CSRs (interviews 2, 4).

The Energy Union constitutes a partial shift in energy governance towards a more decentralised and bottom up - i.e. soft - process (Bocquillon & Maltby, 2020; Ringel & Knodt, 2018). It introduces an innovative piece of legislation to monitor national efforts, progress and compliance with headline energy and climate objectives, modelled on the Semester at member states' request (interviews 1, 3, 12).

Applying the Experimentalist Governance framework, the Governance Regulation contains mechanisms similar to those in the Semester. First, its **framework goals** – including the 2030 targets for GHG emission reductions (-40% binding at EU and national levels), renewable energy supply (32% binding at EU-level only) and energy efficiency (32.5% non-binding) – are defined centrally and associated legislation, such as the revised Renewable Energy Directive, define precisely how to measure progress. Second, a novel 'pledge and review' process is introduced (Oberthür, 2019).

Similarly to the Semester, member states, as the '**lower level units**', have submitted integrated 10-year National Energy and Climate Plans (NECPs) to the Commission by 2019, representing their contribution towards meeting the framework goals. Existing **reporting** requirements, such as those within the Renewable and Energy Efficiency Directives, are streamlined. The draft NECPs include information defined in broad terms in the Governance Regulation and further specified through Commission templates and a continuous informal dialogue with member states (mechanism J). Taking stock of national pledges and any identified ambition (and later implementation) gaps, the Commission can issue non-binding recommendations to member states.

Finally, these processes are subject to **periodic revision**. The annual State of the Energy Union report will track progress towards EU objectives. The Commission will also have close oversight in reviewing biennial progress reports on NECPs' implementation from 2021 (article

17), and by 2023 will review progress towards achieving the 2030 goals and Paris Agreement commitments, ‘including provision for a review and potential increase in the Union-level target’ (EP & the Council, 2018a, p. 5). The increase in renewable and energy efficiency targets, pushed by the European Parliament and eventually adopted by the more reluctant but divided Council between 2014 and 2018, demonstrates the potential for upward revision (Bocquillon & Maltby, 2020).

3.2. The harder edge of the Governance Regulation

Some energy and climate objectives are binding and enforceable by the Court. These include national emission reduction targets in sectors not covered by the Emission Trading Scheme (EU ETS), eco-design provisions and sub-targets included in the Energy Efficiency Directive (mechanisms A, F). A high threshold for change exists within the associated legislation, where several targets and obligations are made binding and change would require the Commission to issue new legislative proposal(s) (mechanism I).

Specificity is also key to the hardening of softer targets. Although the renewable energy target is only binding at the EU level, included in an Annex is an indicative formula for the calculation of national objectives to achieve the EU goal (EP & the Council, 2018b: Annex II) (mechanism H). These provide a clear benchmark to assess individual national failures and shame ‘laggards’ (interviews 5, 9) (mechanism B). Indeed, in its recommendations of June 2019 on the very first NECPs, the Commission used the formula to recommend more renewables ambition from 12 states (Euractiv, 2019). In addition, the monitoring process has been strengthened through precisely defined but indicative national renewable trajectories towards meeting the final national targets - including three reference points (Articles 4.2 & 29).

The shadow of legislative instruments is also important. The Commission is empowered to adopt delegated acts to bring the Governance Regulation in line with the evolution of the EU's long-term energy and climate strategy as part of the Paris agreement (Article 43) (mechanism G). Evaluating NECPs, if there is an ambition or implementation gap, the Commission 'shall propose measures and exercise its powers at Union level... to ensure the collective achievement of...objectives and targets' (Article 31). Within the EU's energy competences, the Commission can therefore propose, or threaten to propose, new legislation if member states are not on track towards their objectives, exposing them to the vagaries of coalition politics in the Council and influence of the European Parliament.

The NECPs and recommendations are made public, and it is hoped that this increased transparency will facilitate peer pressure from other governments at the EU level, and public criticism by, "opening up space to civil society to pressure national governments" (interview 1), forcing public justification and shaping policy (interviews 3, 4, 5, 8, 9, 11) (mechanisms B, C, D). The publication of the Commission's first summary of recommendations in June 2019 (Commission, 2019) was followed by extensive media coverage and criticism from NGOs (The Guardian, 2019).

Finally, the Governance Regulation couples the processes of reporting and monitoring for energy and climate, in pursuit of better coherence and coordination between the two sectors (interviews 7, 8) (mechanism E). Arguably, the policy coupling of energy and climate policy, a more established policy area which benefits from strong support and momentum, can be interpreted as a way to consolidate EU energy policy.

3.3. The drivers of HSG in energy governance

Functionally, a flexible model of Experimentalist Governance reinforced by harder features is well suited to accommodate the diversity of national energy mixes, political infrastructures and institutional settings. This is compounded by the multiplicity of actors involved at national and EU level (polyarchic distribution of power). The Governance Regulation might also suit an energy transition in which longer-term dynamics of technological and social change are uncertain and difficult to predict (strategic uncertainty). A key example here is the recent rapid decrease in the renewable energy costs. Regular stock-taking and revision of goals could allow learning and adaptation to these changes. The ‘pledge and review’ process is partially modelled on the Semester but also, and perhaps more importantly, on the 2015 Paris [Climate] Agreement, which is decentralised and non-binding at the national level (Oberthür, 2019). Recurring stocktaking and revisions make it possible to adapt the Governance Regulation to the evolution of international negotiations.

More importantly, the principal driver is member states’ concerns about sovereignty. These have long limited national governments’ willingness to delegate further power to the EU level in energy policy (Bocquillon & Maltby 2020), and the exploitation of national energy resources, determination of the energy mix and taxation have indeed remained firmly national prerogatives. It is largely on sovereignty grounds that the European Council did not endorse binding national renewable energy targets in 2014 (The Guardian, 2014), and many member states were adamant about retaining their ability to define their own national policies (interviews 3, 6, 8, 13). Where powers for the Commission can be argued to have been enhanced, including the surveillance and publicity of member state plans, this is linked to, and compensation for, the removal of national targets for renewables (interviews 8, 10). In the absence of hard national targets enforceable by the Court, Commission, European Parliament and some member states were concerned about the ability of the EU to reach its collective target and about the risk of free-riding by less ambitious countries (interviews 10, 13). The

Governance Regulation accommodates national sovereignty concerns and provides flexibility while inserting national plans into a collective monitoring process under the Commission's leadership to facilitate convergence towards common objectives. It constitutes a partial softening of an already existing legal framework – for renewable energy – although with strengthened Commission monitoring powers (Oberthür, 2019).

Table 1: HSG in Health and Energy

Mechanism	Health – European Semester	Energy – Governance Regulation
(A) 'Hard' targets/implementation	The Semester implements binding SGP debt and deficit targets.	GHG (EU & national) and renewable (EU only) targets binding. Energy efficiency headline target non-binding; specific targets binding.
(B) Naming, blaming and shaming	Country-specific analysis in the Country Reports; 'Social scoreboard'.	NECP plans made public to increase transparency and peer pressure on laggards.
(C) Institutionalising political entrepreneurs	The institutionalised role of social actors and civil society.	Publicising drafts, plans and gaps to foster civil society participation in/and accountability.
(D) Justification	Amendments to CSRs require public justification; National Reforms Programmes serve as justification on progress.	Governments must publicly respond to Commission recommendations re ambition gap(s).
(E) Policy field coupling	Linked with European Structural and Investment Funds.	Harnesses energy objectives to climate governance (e.g. emissions reporting).

(F) Sanctions	Excessive Deficit Procedure and Macroeconomic Imbalance Procedure both entail sanctions.	Only climate targets enforced by Court. States required to follow the process (timely submission of plans, complete submission).
(G) Tertiary legislation	N/A.	Commission can issue delegated acts to bring EU framework in line with the Paris Agreement, and propose secondary legislation if ambition/implementation gap.
(H) Specificity / tangibility of recommendations	CSRs and Country Reports identify tangible policy targets.	Commission templates for NCEPs. Renewables formula provides guidance on objectives and benchmarks.
(I) High threshold for amendment / change / input	Amendment to CSRs and opposition to sanctions requires reinforced and reversed qualified majority respectively.	Change to EU/national objectives requires legislative change under Ordinary Legislative Procedure, using Qualified Majority Voting (Commission proposal, agreement of Council and European Parliament).
(J) Enhanced (or variable degrees of) surveillance	Member states subject to EDP are subject to enhanced monitoring.	Standardised, comprehensive process of reporting. Publication of detailed national plans, based on templates, enable the Commission to track progress.

4. Lessons from the Semester for energy governance

Lesson-drawing from the Semester for the operation of the Governance Regulation must take account of the differing origins and intentions of these two architectures. Although the policy sectors share similar histories and politics, and even though the Governance Regulation is partly modelled on the Semester, there are several notable differences. At a most fundamental level, the Semester is a reactive, crisis-driven framework, which health has become part of without being its sole or main target, whilst the Governance Regulation seeks to set a positive, proactive agenda for further integration in energy. Dissimilar starting points have resulted in institutional differences, particularly the extent to which voluntarism is reshaped with hard obligations and sanctions. Energy encompasses a wider range of ‘harder’ legislative elements, which translates in the context of the Governance Regulation to a stronger backing - and shadow - of hierarchy. On the other hand, the scope of hard legislation is more limited in health but, where the EDP and other hard elements of the SGP apply, the Commission’s recommendations as part of the Semester are, in principle, stronger than in the Governance Regulation. In both sectors the picture is therefore contrasted, presenting a mix of harder and softer elements whose interactions are (or will be) key.

A first lesson is that, as important as the interplay between binding and non-binding elements may be in principle, how they are applied in practice is (or will be) even more important. On the one hand, although sanctioning powers have yet to be tested as part of the Semester, the French case (discussed above) illustrates the potential implications of hardening mechanisms for specific policy sectors. On the other, we know from the experience of the SGP, where repeated French and German violations went unpunished (Chang, 2006), that the power to sanction is not the same as the will to sanction.

A second and related point is that the changing political context and degree of politicisation of both processes is (or will be) decisive to their practical implementation, conditioning their

stringency. The implementation of the Semester has been dependent on the strength of consensus among member states about fiscal stabilisation, and on the willingness of the Commission to enforce it rigorously in the face of political costs - e.g. fuelling public backlash and rising Euroscepticism. Whilst the European Semester had the potential to become very political, to date it has not, remaining instead a largely technocratic exercise that is rarely reported in national media and that receives inconsistent attention from national parliaments (Kreilinger, 2018). Similarly, the implementation of the Governance Regulation is designed to politicise the planning, reporting and monitoring process by subjecting decisions to public debates at the national and EU levels and putting pressure member states who would be lagging behind in terms of commitments and/or implementation. Such politicisation will be important to determine its strength, or else may lead to a technocratic process, limiting its purchase.

Third, the operation and evolution of the Governance Regulation will depend in large part upon the engagement and approach of relevant policy entrepreneurs. The health (and broader social) policy experience through the Semester illustrates the impact that this can have upon the direction and operation of the governance architecture, by altering objectives, for instance to better account for social goals, and increasing accountability. The Governance Regulation provides an avenue for the involvement of civil society and other actors, which is already drawing attention. If the Commission and European Parliament manage to seize this process as an opportunity to further extend their influence and work together with civil society, member states may find the careful delimitation of national and supranational responsibilities challenged and the scope of EU influence expanded.

Fourth, policy coupling is an important and influential hardening mechanism. The Semester has strengthened linkages between EU funds – such as the ESIF – and broader policy objectives. In health, this has turned unrelated financial instruments into tools of leverage.

Similarly, where energy is linked to horizontal issues such as climate change, in which EU competences and legitimacy are more firmly established, this presents a potential avenue for further hardening of the Governance Regulation. Such linking is already present in the cross-sectoral nature of the NECPs, which bundle different policy reporting and objectives together. It is not unforeseeable that political entrepreneurship on the part of the Commission combined with windows of political opportunity opened by crises and events will lead to an expansion of the reach of the Governance Regulation.

Fifth, a key lesson from the health experience is the power of specificity. The health-related framework goals set in the AGS have become more precise, limiting governments' flexibility and challenging their ability to claim compliance with vaguely worded recommendations (Baeten & Vanhercke, 2017). The potential for energy governance to utilise the same lever here is strong – the framework goals are already defined in a more precise manner (in the form of quantitative targets) and the creation of templates for structuring national plans promises a degree of tangibility which was missing from health-related recommendations in the early cycles of the Semester.

Finally, the Semester illustrates how crucial the possibility for periodic revision – a key feature of Experimentalist Governance frameworks – is for the power of each of the mechanisms identified above. The Semester process has been continually adjusted, most notably to ensure the participation of civil society actors (Zeitlin & Vanhercke, 2018). Regular 're-opening' of the Governance Regulation process and commitment to learning from its operation - through bi-annual reporting and the review clause, for instance - may create space for political entrepreneurs to shape its goals, advocate for greater policy coupling and coherence, and increase and guide the specificity of its content. There is potential for more precise and stringent obligations over time, but this is dependent on the broader context, including the continued

salience of energy and climate issues, as well as pressure arising from international climate negotiations. If the Governance Regulation fails to achieve the headline goals of the EU's long-term energy and climate strategy as part of the Paris agreement, some member states may be willing to strengthen the process further, and the shadow of new legislative proposals may sway the most reluctant of them.

Conclusion

At the EU level, there has been a shift towards the hardening of soft types of governance architectures. This is illustrated here through the case of health policy as part of the European Semester, and the new framework for energy governance. We show that energy policy's Governance Regulation resembles and, indeed, has been inspired by the European Semester's governance model. Combining the experimentalist and HSG frameworks, we identify a range of mechanisms aimed at ensuring not only cooperation in these sensitive areas, but also compliance in the absence (or incomplete nature) of strong legal guarantees.

We find that this shift has been primarily driven by politics and reflects attempts to foster cooperation while alleviating member states' enduring sovereignty concerns. In health policy, the activism of entrepreneurial actors and threat of penalty defaults in the form of leadership by non-health actors have been decisive in bringing key objectives under the harder edge of the Semester. In contrast, in energy, the shift towards HSG has been driven by a need to alleviate states' sovereignty concerns whilst meeting climate and clean energy headline goals that member states have collectively bound themselves to.

Inferring from the longer experience of health as part of the Semester, we point to six aspects that may be important to the future of the Governance Regulation: the practical implementation

of mechanisms; the power of specificity; the role of policy coupling; the potential influence of policy entrepreneurs; the role of politicisation; and the significance of periodic revisions.

The extent to which a HSG architecture succeeds in terms of policy implementation and goal achievement in energy will be contingent upon member states' enduring commitments to the process and headline goals. This in turn depends upon whether energy and climate policy remain high on national and EU agenda. The Governance Regulation could either facilitate a further politicisation, or instead remain a largely technocratic exercise, as demonstrated in the case of the Semester and health policy.

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Appendix 1: List of interviewees

1. Think tank representative, 13.04.18
2. DG Energy, 02.07.18
3. European Parliament, 05.07.18
4. European Commission, 02.07.18
5. Senior EU official, 10.04.18
6. Polish official, 09.04.18
7. DG Energy, 13.04.18
8. Swedish official, 29.06.18
9. Member state official, 02.07.18
10. Journalist, 04.07.18
11. Member state official, 04.07.18
12. Member state official, 05.07.18
13. Journalist, 06.07.18
14. Council Official, 22.06.17
15. Member state official, 22.06.17
16. Member state official, 23.06.17
17. Health NGO, 23.06.17
18. Social Protection Committee, 06.07.17
19. DG ECFIN, 07.07.17
20. European Parliament official, 07.07.17
21. DG Sante, 08.07.15